AN INDEPENDENT VICTIMS' LAWYER TO PROTECT 'VULNERABLE INDIVIDUALS': CAN THE VLRC'S RECOMMENDATION BE IMPLEMENTED AND IF SO, SHOULD IT?

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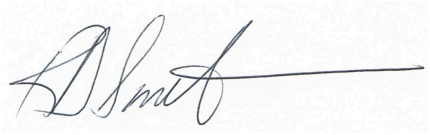
Signature  Date 5 October 2018

ABSTRACT

In 2016, the Victorian Law Reform Commission recommended that government-funded lawyers be provided to victims of violent indictable crimes under certain circumstances. This included instances involving the protection of 'vulnerable individuals'. A funded independent lawyer for victims has the potential to mitigate common grievances of victims in criminal trials and should be implemented. Therefore, it is vital that the feasibility and implications of the requirement that the service be used to 'protect particularly vulnerable individuals' be explored.

Several issues with imposing such a requirement are raised and explored in this thesis. First, existing definitions of 'vulnerability' and methods of identifying vulnerability in other contexts all prove too subjective, overly simplistic, or too specific to their particular context to apply in this recommendation. However, even if a definition of vulnerability could be established, the therapeutic jurisprudence implications of requiring victims to prove their vulnerability may outweigh the service's intended benefits. Therefore, I conclude that 'vulnerability' is an inappropriate way to assess eligibility for this service and explore possible alternatives to ensure this recommendation achieves its important objectives.

INTRODUCTION

In July 2018, the Victorian government introduced a bill to 'implement a number of recommendations made by the Victorian Law Reform Commission (VLRC) arising out of its 2016 report, *The Role of Victims of Crime in the Criminal Trial Process*'.[1] The government announced that these reforms would go towards 'addressing a serious historical injustice' with regards to the treatment of victims in criminal trials.[2] In essence, the VLRC's report had concluded that victims deserved to be treated as 'participants' in the criminal trials of their accused perpetrators.[3]

To achieve this, the report put forward several recommendations, which as seen above the government is clearly committed to implementing. One of the recommendations that have yet to be implemented was to provide government-funded lawyers to victims of violent indictable crimes in certain circumstances.[4] These circumstances included providing 'legal advice and assistance' for matters in relation to 'protecting vulnerable individuals'.[5]

A funded independent lawyer for victims has the potential to mitigate common grievances of victims in criminal trials and should be implemented. Therefore, this thesis will examine the recommendation's requirement that the service be used to

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[1] Explanatory Memorandum, Victims and Other Legislation Amendment Bill 2018 (Vic) cl 1.

[2] Attorney-General, 'Addressing Injustice and Improving the Rights of Victims' (Media Release, 24 July 2018).

[3] Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Victorian Law Reform Commission, 2016) vi.

[4] Ibid 126.

[5] Ibid.

protect ‘vulnerable individuals’ and explore the feasibility and implications of such a recommendation.

In this thesis, I will raise and explore several concerns about the requirement that the service be used to protect ‘vulnerable individuals’. First, existing definitions of ‘vulnerability’ and methods of identifying vulnerability in other contexts all prove too subjective, overly simplistic, or too specific to their particular context to apply to this recommendation. Secondly, even if a definition of vulnerability could be established, the therapeutic jurisprudence implications of requiring victims to prove their vulnerability could outweigh the service’s intended benefits or result in biased or unjust outcomes. Therefore, this thesis concludes that ‘protecting vulnerable individuals’ is an inappropriate premise on which to grant this service and explores possible alternatives to ensure this recommendation achieves its objectives.

While focused on the implementation of this singular recommendation, this thesis is part of a broader conversation about how victims are treated in our criminal justice system and how they may be better served. Throughout this thesis, I will explore several themes that have far-reaching implications beyond this recommendation such as the appropriate role of victims in criminal trials, the concept of vulnerability, the operation and therapeutic jurisprudence consequences of victim entitlements generally and political and social biases about ‘deserving’ victims. To do this, I will draw on several strands of literature including critical theory, feminist theory, victimology studies, and therapeutic jurisprudence discussions.

The thesis will begin with a review of the current framework for victims in criminal trials and the recommendation’s place in it. Then, in Chapter 2 I will explore the

practical challenges of defining vulnerability in the context of the recommendation. In Chapter 3, I will explore the therapeutic jurisprudence and more theoretical challenges of requiring victims to establish vulnerability to access the service. Finally, I will discuss possible alternatives and assess their capacity to overcome these challenges.

CHAPTER I: LITERATURE REVIEW AND BACKGROUND

I VICTIMS IN CRIMINAL TRIALS

Criminal trials are 'a contest between the prosecution, acting as the state's representative, and the accused, usually represented by a defence lawyer. The victim is not a party to the proceeding'.[6] This is 'an essential feature of Australia's common law legal system'.[7]

> Hence the situation [for victims] of being just another witness, with no special rights, with no right even to appear as a witness unless called, and no right to insist on a prosecution unless the agents of the state agree. Hence the fact that there are no special facilities for victims. They are left to sit outside the courts alongside defendants and their relatives. They have no special representative: the prosecutor's duty is not to the victim but to the state. Indeed, in summing up to the jury prosecutors are fond of pointing out just how separate from the victim they are, and as a result how much more credible is their story compared to that of the biased defence.[8]

This summary from Doreen McBarnet highlighted the 'plight of the victim in adversarial courtrooms'.[9]

Historically, however, victims were 'both central to and indispensable for the processes of justice'.[10] The early Anglo-Saxon criminal justice system involved 'complaints

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[6] Ibid 12.

[7] Ibid xiii.

[8] Doreen McBarnet, 'Victim in the Witness Box — Confronting Victimology's Stereotype' (1983) 7 Contemporary Crises 293, 300.

[9] Jonathan Doak, 'Enriching Trial Justice for Crime Victims in Common Law Systems: Lessons from Transitional Environments' (2015) 21 *International Review of Victimology* 139, 140.

[10] Tony Kearon and Barry S Godfrey, 'Setting the Scene' in Sandra Walklate (ed) *Handbook of Victims and Victimology* (Routledge, 2011) 17, 18.

brought directly by victims or their families against an alleged perpetrator with a complex system of financial compensation paid directly to the victim or victims' family by the "convicted" offender'.[11] Over time, however, late Anglo-Saxon Kings began 'attempting to shift the emphasis away from crime being against the victims towards an offence against God and the King's peace'.[12] It was under this rationale that the State gradually increased their prosecutorial powers in criminal cases eventually acquiring the powers to press charges themselves and bypass victims entirely.[13]

So, many of the prosecution's functions today can actually 'be traced back to the early right of the victim to administer justice' that eventually shifted through a 'gradual sharing of powers once possessed by the victim in favour of a growing need to secure the peace'.[14] However, this led to criticism that 'the dominance of the Crown and state excludes victims as relevant participants' and that victims were being 'identified with scepticism, reviled as emotional and vindictive and as incapable of rational, fair judgment'.[15]

These criticisms gave rise to early victim rights movements and by the 70s 'victims [had] formed grassroots movements to lobby government in support of greater victim's services, such as state-based compensation'.[16] Today, '[v]ictim's rights have been

[11] Barry Godfrey, 'Setting the Scene: A Question of History' in Sandra Walklate, *Handbook of Victims and Victimology* (Routledge, 2nd ed, 2018) 13, 14.

[12] Ibid.

[13] Ibid.

[14] Tyrone Kirchengast, *Victims and the Criminal Trial* (Palgrave Macmillan, 2016) 12.

[15] Ibid 13.

[16] Tyrone Kirchengast, 'Recent Reforms to Victim's Rights and the Emerging "Normative Theory of the Criminal Trial"" (2010) 56 *Criminal Law Quarterly* 82, 93–4.

inserted into the law in various ways'.[17] Victorian examples include the *Public Prosecutions Act 1994* (Vic) that requires 'that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime'.[18] The *Victims' Charter Act 2006* (Vic) further established 'the victim as a key participant in the criminal justice system' by establishing a complaints process for those who may have been affected by a failure to uphold the Charter's principles.[19] The *Victims of Crime Commissioner Act* 2015 (Vic) established a Victims of Crime Commissioner to 'advocate for the recognition, inclusion, participation and respect of victims of crime' by relevant bodies, 'carry out inquiries on systemic victim of crime matters', 'report to the Attorney-General' on those matters, and advise relevant bodies 'regarding improvements to the justice system to meet the needs of victims'.[20] Several agencies have also been established to enable and support victims' participation in criminal trials.[21] These include the Victims Support Agency, the Witness Assistance Service and the Child Witness Service.[22] There have also been several reforms to criminal procedures, mainly with regard to evidence laws, to protect victims while engaging in the criminal trial.[23]

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[17] Ibid. See also Victorian Law Reform Commission, above n 3, 15–19.

[18] *Public Prosecutions Act 1994* (Vic) s 24(c).

[19] Victorian Law Reform Commission, above n 3, 16; *Victims' Charter Act 2006* (Vic) s 20(c).

[20] Victorian Law Reform Commission, above n 3, 17; *Victims of Crime Commissioner Act 2015* (Vic) ss 6, 13.

[21] Victorian Law Reform Commission, above n 3, 17.

[22] Ibid 17–18.

[23] Ibid 18. See, eg, *Criminal Procedure Act 2009* (Vic) ss 123, 133(2), 339, 341–2, 349, 353–5, 360, 363–5, 367–70, 372–4, 376, 378–9; *Sentencing Act 1991* (Vic) ss 8R–8S; *Open Courts Act 2013* (Vic) ss 18(1)(d), 30(2)(d); *Evidence (Miscellaneous Provisions Act 1958* (Vic) s 32C.

However, the extent to which these statutory reforms have translated into effective opportunities for participation is questionable. For example, the Director of Public Prosecution's policies require victims' views be taken into account in decisions of discontinuance, resolution, or withdrawals of charges.[24] However, the VLRC's report into the role of victims in criminal trials found '[t]he extent and adequacy of consultation about these decisions vary considerably' with some victims reporting that consultation had been inadequate while others reported that they had not been consulted at all.[25]

It has been suggested that these legislative reforms may never adequately facilitate victim participation without addressing the ingrained 'adversarialism and bipartisanship [that] remain firmly ingrained in the mechanics of the common law criminal trial' — that is the criminal trial's operation as a proceeding between the prosecution and defence.[26]

After all, the prosecution's primary obligation is still to 'act exclusively in the public interest', prosecute 'impartially and with restraint, and act fairly towards the accused'.[27] As such, it might be unreasonable to expect that they would be able to also effectively facilitate victim participation in all cases, as their interests may often diverge. For example, the prosecution often has to assess the credibility of complainants and the likelihood of a successful conviction before embarking on a trial. While a fundamental

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[24] Director of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria* (2016) Office of Public Prosecutions Victoria, 16 <http://www.opp.vic.gov.au/getattachment/b5d48af4-3bef-4650-84fa-6b9befc776e0/DPP-Policy.aspx>.

[25] Victorian Law Reform Commission, above n 3, 135.

[26] Doak, above n 9, 140.

[27] Victorian Law Reform Commission, above n 3, 133.

feature of Victoria's criminal justice system, victims' expectations that their testimonies will be met with validation and respect may be dashed if faced with a prosecutor who is obligated to remain impartial and critical.[28]

II An Avenue for Victim Participation

In light of this potential conflict, the VLRC found that legal assistance for victims may be appropriate in instances 'where the prosecution's obligations to be impartial' may prevent them from adequately serving victims.[29] The idea of offering a lawyer independent of the prosecution to victims or an independent legal representative (ILR) has been widely explored,[30] especially in the context of sexual assault victims who are often particularly disenchanted by the criminal justice system.[31] Some of the envisaged possibilities of an ILR included the ability to:

> put the victim's views in the appropriate forums, monitor and enforce mandated procedure and inform and consult with victims about the trial and the criminal justice process … represent the victim's views and needs at bail hearings, convey the victim's views about the laying or altering of charges and ensure that where those views are not

[28] Ibid.

[29] Ibid 165.

[30] The report does not name the lawyers that would be provided in this service. I have chosen to adopt the term independent legal representative (ILR) as used by Mary Iliad in her recent PhD that discusses the same recommendation: Mary Iliad, *Adversarial Justice: 'A Triangulation of Interests'? Reconceptualising the Role of Sexual Assault* Victims (PhD Thesis, Monash University, 2017).

[31] See, eg, Paulette Benton-Greig, 'The Needs of Victims in Sexual Offence Trials' (2011) 17 *Canterbury Law Review* 88; Margaret Gavin and Douglas E Beloof, 'Crime Victim Agency: Independent Lawyers for Sexual Assault Victims (2015) 13 *Ohio State Journal of Criminal Law* 67; Fiona E Raitt, *Independent Legal Representation for Complainers in Sexual Offence Trials: Research Report for Rape Crisis Scotland*, (Rape Crisis Scotland, 2010); Mary Iliad, *Adversarial Justice: 'A Triangulation of Interests'? Reconceptualising the Role of Sexual Assault* Victims (PhD Thesis, Monash University, 2017).

> reflected in the outcome the victim has a full opportunity to understand why. The [ILR] could also represent the victim's interests in various pre-trial applications including applications as to admissibility of evidence and the use of alternative ways of giving evidence as well as explaining and preparing the victim for the trial process.[32]

However, at its core the value of an ILR lies in its ability to unabashedly act only in the best interests of victims, without any potentially countervailing obligations. Some have argued that ILRs may compromise the nature of criminal trials as a 'two-party contest' and may disrupt, delay or challenge the 'public interest underpinnings of the adversarial criminal justice process' by affording victims a private interest in the proceeding.[33] Therefore, any ILR powers must be defined with these common law boundaries in mind and be limited to certain appropriate circumstances.

In the case of the VLRC recommendation, ILRs were 'to provide legal advice and assistance… in relation to substantive legal entitlements connected with the criminal trial process, asserting a human right, or protecting particularly vulnerable individuals, in exceptional circumstances'.[34] In these instances, the VLRC recommended that 'Victoria Legal Aid should be funded' to provide ILRs to 'victims of violent indictable crimes, modelled on the Sexual Assault Communications Privilege Service [SACPS] at Legal Aid NSW'.[35]

In the cases that involved asserting a human right or protecting vulnerable individuals, the VLRC envisaged that ILRs would represent these victims through the existing

[32] Benton-Greig, above n 31, 92.

[33] Kirchengast, above n 14, 12.

[34] Victorian Law Reform Commission, above n 3, 126.

[35] Ibid.

common law rules for non-parties to 'appear and make submissions' at trials.[36] The VLRC considered it 'impractical to specify when such assistance would be necessary' in accordance with the courts' general reluctance 'to create strict rules around when non-parties are entitled to appear and make submissions'.[37]

However, the VLRC did provide several examples as to when the recommendation may apply. For example, to represent a child when the child's 'capacity and competency to give evidence were in question' or to help victims protect or suppress sensitive information that would have otherwise been introduced at trial.[38] These examples provide some guidance as to how the VLRC's ILRs might be used to assert a human right or protect vulnerable individuals. However, the VLRC offered no clarification as to who these 'vulnerable individuals' would be for the purposes of this recommendation.

Given that this service is to be publicly funded through Legal Aid, the service would probably owe an obligation of 'transparency… about how public money is spent'.[39] So, if this recommendation is to have any practical effect, research into how eligibility for this service would be determined is important. This is especially so given that 'even the most progressive legislation can be lost in translation … where there is a greater degree of discretion in how reformed legislation is applied'.[40]

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[36] Ibid 163–5.

[37] Ibid163, 165.

[38] Ibid 164.

[39] Victoria Legal Aid, *Our Role in Criminal Trials* (7 June 2018) Victoria Legal Aid <https://www.legalaid.vic.gov.au/contact-us/media-enquiries/our-role-in-criminal-trials>.

[40] Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-Focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions* (Commonwealth of Australia, 2014) 16.

III UNPACKING THE VLRC'S RECOMMENDATION

First, it will be important to understand the program that the VLRC's recommendation is to be modelled upon. The VLRC discussed several potential avenues through which victims might access the independent lawyer needed for this recommendation, such as Community Legal Centres, Victoria Legal Aid and CASA.[41] However, ultimately recommended that the service be modelled after NSW's SACPS.[42]

NSW's SACPS protects 'counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence'.[43] It was recognised that disclosing these counselling records could have many negative consequences such as reducing the effectiveness of the counselling process, reducing the reporting of sexual offences and exacerbating the humiliation and trauma already inherent in cross-examinations for victims.[44]

As such, the privilege was established so that leave to admit such evidence would not be granted unless the evidence was of substantial probative value, no other evidence concerning the matters in question was available and the public interest in preserving the victims' confidentiality and protecting them from harm was 'substantially outweighed' by the public interest in admitting the evidence.[45] In the past, 'often the

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[41] Victorian Law Reform Commission, above n 3, 123–6.

[42] Ibid 126.

[43] *Criminal Procedure Act 1986* (NSW) div 2.

[44] Catherine Gleeson, 'Striking a Balance: The Proper Operation of the Sexual Assault Communications Provisions' [2013] (Autumn) *Bar News: The Journal of the NSW Bar Association* 66, 66. See also Glenn Bartley, 'Sexual Assault Communications Privilege under Siege' [2000–2001] (Summer) 6, 7–8.

[45] *Criminal Procedure Act 1986* (NSW) s 299D.

person or service represented themselves in court' to argue that the privilege applied.[46] However, with the implementation of SACPS in late 2011, a specialist unit of Legal Aid NSW, this was no longer the case.[47]

SACPS lawyers 'have two jobs: to advise the person about their SACP [sexual assault communications privilege] options, so that they make informed decisions about their private information, and, if necessary, to advocate for them in court.[48] The service is available to '[a]ll sexual assault victims, whether child or adult'.[49] Through SACPS, '[f]or the first time in Australia, victims of sexual assault who want to claim the privilege in Court now have publicly funded lawyers to help them do that'. Today, '[f]ree lawyers are routinely provided to represent the victim directly' through the service. SACPS 'accepts statewide referrals for victims of sexual assault who is affected by the privilege … [and] no means or merits test is applied.'[50]

SACPS lawyers are described as 'specially trained and can go to any criminal court in NSW'.[51] This training is to promote 'sensitive engagement with traumatised sexual assault victims' and provide these lawyers with 'a thorough technical understanding of

[46] Women's Legal Service NSW and Legal Aid NSW, *Subpoena Survival Guide: What to Do When A Court Wants Confidential Client Information in NSW* (Legal Aid NSW, 2016) 34.

[47] Sexual Assault Communications Privilege Service, *Their Privacy is Your Priority* (25 October 2013) Legal Aid New South Wales <https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/their-privacy-is-your-priority>.

[48] Women's Legal Service NSW and Legal Aid NSW, above n 46, 34.

[49] Ibid 25.

[50] Ibid 34.

[51] Ibid 25.

the privilege and practical legal strategies for representing complainants'.[52] Their role includes speaking on behalf of the complainants themselves, opposing either the defence or prosecution as necessary, as well as guiding the court 'on the operation of the privilege and the complainant's right to privacy'.[53]

From this it would appear that there are several key attributes of SACPS that would likely extend to the lawyers envisaged by the VLRC's recommendation:

- The lawyer would be independent of both the prosecution and defence, advocating only for the victim's interests
- They would have advisory capabilities to the court
- They would have undergone sensitivity and technical training
- They would have the ability to represent victims directly in court
- No means or merits test would apply to victims who qualified for the service.

However, the eligibility criteria for SACPS and the VLRC's recommendation are notably different. SACPS was limited to a single defined privilege. In contrast, the VLRC's recommendation envisages that their ILRs would be limited to undefined 'exceptional circumstances' to enforce substantive legal entitlements and other subjective uses such as 'asserting a human right or protecting vulnerable individuals'.[54]

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[52] Legal Aid New South Wales, *Privacy for Sexual Assault Victims* (3 September 2012) Legal Aid NSW <https://www.legalaid.nsw.gov.au/about-us/news-and-media/legal-aid-news/legal-aid-news-articles/september-2012/privacy-for-sexual-assault-victims>.

[53] Legal Aid New South Wales, *Sexual Assault Communications Privilege Service* (4 May 2017) Legal Aid NSW <https://www.legalaid.nsw.gov.au/what-we-do/civil-law/sexual-assault-communications-privilege-service>.

[54] Victorian Law Reform Commission, above n 3, 126.

Also, unlike SACPS, which is only available to victims of sexual assault, the VLRC envisages making this service available to all victims of violent indictable offences.[55] This would include crimes such as aggravated burglary, indecent assault, manslaughter and murder in addition to sexual offences.[56] As such, if the recommendation follows in SACPS's footsteps, the VLRC recommendation would likely be accessible to a far greater number of people with no means and merits test. This may be why the VLRC felt it necessary to put qualifiers in their recommendation, including that it would only be accessible by 'vulnerable individuals' in 'exceptional circumstances'.[57]

However, one of SACPS's most admirable features was its accessibility. Victims of sexual assault whose records had been subpoenaed were guaranteed advice and assistance as needed. This is a luxury afforded by the specificity of those who could access SACPS — victims of sexual offences whose medical or counselling records had been subpoenaed for trial.

As mentioned earlier, however, the VLRC's recommendation appears to be quite subjective, without definitions or much guidance regarding seemingly key terms like 'exceptional circumstances', 'human rights' or 'vulnerable individuals'.[58] While well intentioned, this recommendation could ultimately only complicate a victims' path to participation if victims are confused as to their eligibility for the service. A poorly defined eligibility process could also result in the service being exclusionary to those who may need it most or conversely overtly broad such that the service becomes

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[55] Ibid.

[56] State of Victoria, *Types of Offences* (15 June 2018) Victims of Crime <https://www.victimsofcrime.vic.gov.au/charges-laid/types-of-offences>.

[57] Victorian Law Reform Commission, above n 3, 126.

[58] Ibid.

practically infeasible. So, for the purposes of this thesis, I will explore the VLRC's reference to 'protecting vulnerable individuals'.[59]

It is worth noting at this stage that while the VLRC used the words 'vulnerable individuals' in the recommendation itself,[60] references to the recommendation within the body of the report use the term 'vulnerable victims'.[61] It is, therefore, unclear to me whether the recommendation intends for ILRs to only be used by the relevant victim in a criminal trial or by vulnerable individuals who may not necessarily have been a victim of the crime in question. It is recommended that this discrepancy be rectified in the future but any further discussion on this point is beyond the scope of this thesis.

This thesis focuses particularly on whether the recommendation's use of 'vulnerability' as an eligibility criterion can and should be implemented. As noted earlier, I will do this through the following structure — in the next chapter, I will explore existing definitions of 'vulnerability' and methods of identifying vulnerability in other contexts and assess its applicability to the recommendation. Then, I will explore the potential therapeutic jurisprudence implications of requiring victims to prove vulnerability and query if those consequences may inadvertently outweigh the service's intended benefits. In light of these findings, I will explore possible alternatives to ensure this recommendation achieves its important objectives.

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[59] The VLRC's reference to equally subjective terms like human rights and exceptional circumstances should also be explored, however, they are unfortunately beyond the scope of this thesis.

[60] See, eg, Victorian Law Reform Commission, above n 3, xxiv, 126.

[61] Ibid xix, 122, 165.

CHAPTER II: DEFINING VULNERABILITY

I INTRODUCTION

As mentioned above, given that this would be a government-funded service there must be some transparency in how eligibility for this service would be determined. Therefore, for this recommendation to succeed it is important that there be some guidance as to who would constitute a 'vulnerable individual'. The nature of these guidelines will also be crucial in ensuring 'those most in need of assistance receive it'.[62] Any prescribed guideline will therefore have to be sensitive to the dangers of 'drawing the definition too broadly or too narrowly: In both cases, the cost effectiveness of providing any such special measures would be reduced'.[63]

However, formulating any kind of definition of vulnerability could prove challenging, given the inherently subjective nature of vulnerability and the fact that 'despite the popularity of the notion of vulnerability and its investigations, there is no comprehensive theory of vulnerability'.[64] Moreover, of the theories of vulnerability that do exist, some could even be seen to be inherently contradictory to the premise of the VLRC's recommendations.

II THEORIES OF VULNERABILITY

Arguably, the theory most at odds with the recommendation's underlying premise is Judith Butler's universal theory of vulnerability. Butler found that to 'critically evaluate

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[62] Robin Elliot, Home Office Research and Statistics Directorate, *Vulnerable and Intimidated Witnesses: A Review of the Literature* (1998) 105.

[63] Ibid.

[64] Barbara A Misztal, *The Challenges of Vulnerability: In Search of Strategies for a Less Vulnerable Social Life* (Palgrave Macmillan, 2011) 32.

and oppose the conditions under which certain human lives are more vulnerable than others', we must first acknowledge 'a common human vulnerability'.[65] Butler argues that we all possess 'a vulnerability to the other that is part of bodily life, a vulnerability to a sudden address from elsewhere we cannot preempt' because we are all 'socially constituted bodies, attached to others, at risk of losing those attachments, exposed to others, at risk of violence by virtue of that exposure'.[66] In short, this theory suggests that 'life itself is vulnerable'.[67]

This approach to vulnerability has the benefit of framing it as 'a universal, inevitable enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility'.[68] Importantly, this could free 'vulnerability' from its 'limited and negative associations'.[69] However, it proves problematic for the purposes of this recommendation because the recommendation was clearly framed to not be available to all individuals. The recommendation was not only limited to victims of violent indictable crimes but also prescribed purposes such as protecting vulnerable individuals.

Yet, any guideline that defines 'vulnerable individuals' as a distinct population would be inherently artificial under this line of thinking. If Butler's approach to vulnerability is correct, then we must accept vulnerability as a universal trait, incapable of being 'identified by "expert" strangers, predicted in advance, or remedied by technical

[65] Judith Butler, 'Violence, Mourning Politics' (2003) 4 *Studies in Gender and Sexuality* 9, 30.

[66] Ibid 20, 27.

[67] Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006) 26.

[68] Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008–9) 20 *Yale Journal of Law and Feminism* 1, 8–9.

[69] Ibid 8.

solutions'.[70] Butler's theory effectively contradicts the recommendation's assumption 'that there are indicators of vulnerability that can be quantified' and suggests that no 'technical solution' such as the VLRC's recommendation can remedy that vulnerability.[71]

However, there may be room to reconcile Butler's theory with the well-meaning intentions of the VLRC's recommendation. As Martha Fineman put it, while '[u]ndeniably universal, human vulnerability is also particular: it is experienced uniquely by each of us and this experience is greatly influenced by the quality and quantity of resources we possess or can command'.[72] She acknowledged that while society cannot eradicate vulnerability, 'society can and does mediate, compensate, and lessen our vulnerability through programs, institutions and structures'.[73]

This interpretation of Butler's theory would coincide with the VLRC's apparent intention of providing funded ILRs to protect vulnerable individuals and thereby 'mediate, compensate, and lessen' their vulnerability.[74] In this way, while Butler's contention that all humans are inherently vulnerable remains true, it is acknowledged that each human would still experience their vulnerability individually and so there may be particular factors that could suggest some individuals to be more vulnerable than others.

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[70] Rosalyn Diprose, 'Corporeal Interdependence: From Vulnerability to Dwelling in Ethical Community' (2013) 42 *John Hopkins University Press* 185, 189.

[71] Ibid 188–9.

[72] Fineman, above n 68, 10.

[73] Ibid.

[74] Ibid.

This would coincide with the views of many other vulnerability theorists who ascertained vulnerability through balancing particular factors. For example, Chambers found vulnerability to involve 'an external side of risk, shocks and stress to which an individual or household is subject; and an internal side which is defencelessness meaning a lack of means to cope without damaging loss'.[75] In other words, he believed that vulnerability involved both exposures to external harmful circumstances and an internal inability to handle those stressors.[76] Moser, on the other hand, felt Chambers' internal component of the ability to handle external stressors would be determinative in ascertaining vulnerability, which she argued was made up of a subject's internal resilience and sensitivity to harmful stressors.[77] So, for example in the case of natural disasters, having a disability may make an individual more *sensitive* to the harms of the external stressor of an earthquake but their vulnerability may be mitigated by their *resilience* to manage that risk because they have 'assets and entitlements that [… they] can mobilize and manage in the face of hardship'.[78]

Watts and Bohle also placed greater focus on Chambers' internal component of vulnerability and redefined Chambers' components.[79] Chambers' external component of vulnerability involving 'risk of exposure to crises, stress and shocks' was relabelled as 'exposure'.[80] Chambers' internal components were then also divided into two factors as

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[75] Robert Chambers, 'Vulnerability, Coping and Policy (Editorial Introduction)' (2006) 37 *IDS Bulletin* 33, 33.

[76] Ibid.

[77] Caroline O N Moser, 'The Asset Vulnerability Framework: Reassessing Urban Poverty Reduction Strategies' (1998) 26 *World Development* 1, 3.

[78] Ibid.

[79] Michael J Watts and Hans G Bohle, 'The Space of Vulnerability: The Causal Structure of Hunger and Famine' (1993) 17 *Progress in Human Geography* 43, 45.

[80] Ibid

Moser did but was renamed as 'capacity' and 'potentiality'.[81] An important difference between Moser's theory and Watts and Bohle's was that Moser largely focused on individual circumstances like a person's physical abilities and finances to assess their internal resilience or sensitivity.[82] Watts and Bohle, on the other hand, also considered larger social and political environments as factors that could affect the capacity and potentiality of their subjects.[83]

Ultimately, across all these theories, vulnerability describes the susceptibility of a subject to harm.[84] As seen above, authors differ as to how that susceptibility may be assessed. However, this lack of consensus has not stopped legislators and policy makers from attempting to assess vulnerability in other contexts.

III VULNERABILITY IN LAW AND POLICY

These other examples of vulnerability in law and policy have two key flaws. First, these existing references to vulnerability often rely on assumptions of inherent or situational vulnerability — that are inconsistent with prevailing theories of vulnerability and bring practical challenges. Secondly, existing definitions are often highly specific to their particular context and therefore of little use in extracting a definition for the purposes of this recommendation.

A *The Challenges of Inherent and Situational Vulnerability*

[81] Ibid.

[82] Moser, above n 77, 3.

[83] Watts and Bohle, above n 79, 48.

[84] Kristina Dietz and Dorothea Whermann, *Vulnerability in the Context of Climate Change* (26 March 2018) Bielefeld University <https://www.uni-bielefeld.de/cias/wiki/v_Vulnerability.html>.

Vulnerability in the context of law and policy often assume two kinds of vulnerability — inherent and situational.[85] Inherent vulnerability relies on factors relating to 'a set of fixed, intrinsic, human characteristics'.[86] For example, the *Queensland Police Service Vulnerable Persons Policy* includes factors such as immaturity, any infirmity, mental illness, and illiteracy, being Aboriginal or of Torres Strait Islander descent and so forth.[87] This policy therefore assumes that a person of Aboriginal descent would be inherently more vulnerable than someone who was not. This approach to vulnerability is admittedly convenient for the purposes of the recommendation. It involves objective factors capable of external assessment.[88]

However, it could very well be the case that '[t]he vast majority of adults who fulfil the criteria for an inherent vulnerability will be able to live full, meaningful and autonomous lives'.[89] The reality is 'that not all members of a group are necessarily vulnerable'.[90] After all, 'what might be regarded as vulnerability from the outside perspective might not be so regarded by the individual. Similarly, a person might perceive themselves to be vulnerable to a risk, which they are not objectively, facing'.[91] In this way, inherent vulnerability effectively neglects the internal component of an individual's ability to handle relevant harm that was so important to many vulnerability

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[85] Michael C Dunn, Isabel CH Clare and Anthony J Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Policy' (2008) 28 *Legal Studies* 234, 239.

[86] Ibid 244.

[87] Queensland Police, *Queensland Police Service Vulnerable Persons Policy,* Queensland Police <https://www.police.qld.gov.au/rti/published/policies/Documents/QPSVulnerablePersonsPolicy.pdf>.

[88] Dunn, Clare and Holland, above n 85, 246.

[89] Ibid 244.

[90] Carol Levine et al, 'The Limitations of "Vulnerability" as a Protection for Human Research Participants' (2003) 4 *American Journal of Bioethics* 44, 47.

[91] Jonathan Herring, *Vulnerability, Childhood and the Law* (Springer, 2018) 11.

theorists in determining vulnerability. Therefore, to adopt this approach would be to knowingly adopt a test predicated on a flawed understanding of vulnerability.

Conversely, situational vulnerability is wholly dependent on the 'personal, social, economic and cultural circumstances within which individuals find themselves at different points of their lives, and an endemic feature of humanity' regardless of their individual characteristics.[92] For example, Victoria's *Evidence Act 2008* includes a few situational factors in identifying vulnerable witnesses, such as 'the nature of the offence' in criminal proceedings or 'the relationship (if any) between the witness and any other party in the proceeding'.[93] In this way, anyone who had an abusive or otherwise potentially harmful relationship with a party in the proceeding, no matter their individual characteristics, may be considered vulnerable by virtue of their situation.[94]

This approach has the benefits of Butler's universal theory of vulnerability in that it theoretically extends vulnerability to anyone and in so doing could help eradicate any potential negative implications of classifying groups of people as vulnerable or non-vulnerable. However, this idea of situational vulnerability could lead to the VLRC's recommendation operating in a way that is 'potentially infinite in scope and application'.[95]

For example, some argue that 'vulnerability is an almost unavoidable result of involvement in the criminal justice' system due to the 'system's often complex

[92] Dunn, Clare and Holland, above n 83, 241.

[93] *Evidence Act 2008* (Vic) s 41(4)(c).

[94] Dunn, Clare and Holland, above n 83, 241.

[95] Ibid.

procedures, which are inherently coercive, imbued with power imbalances and replete with arcane procedures, rules and unfamiliar, specialist language'.[96] Therefore, under situational vulnerability, all victims involved in the criminal justice system could potentially be considered vulnerable. As discussed above, however, the VLRC was clearly averse to making the service available to all victims by limiting the service to victims of 'violent indictable crimes' and only for specific uses. As a government-funded service there would be financial constraints on how readily this service may be provided. Therefore, it could be seen as unfair for the government to fund an ILR for anyone in a particular situation irrespective of characteristics like their finances or physical or mental ability that could help inform their actual need for the service.

Each approach to assessing vulnerability thus brings practical challenges. Under an inherent model of vulnerability, 'obvious problems of inappropriate overinclusiveness (together with less obvious and more controversial problems of underinclusiveness arise'.[97] Conversely, a situational approach to vulnerability could give rise to 'the fear of the slippery slope of open-ended intervention'.[98]

B *The Challenges of the Specificity of Vulnerability*

The actual factors included in existing definitions of 'vulnerability' in law and policy are also largely unhelpful due to their highly contextual nature. For example, vulnerability in employment law placed unique emphasis on capitalism and

[96] Terese Henning, 'Ameliorating Vulnerability Arising from Involvement with Criminal Courts' (2016) 2 *Journal of Criminological Research, Policy and Practice* 185, 186.

[97] Margaret Isabel Hall, 'Mental Capacity in the (Civil Law): Capacity, Autonomy and Vulnerability' (2012) 58 *McGill Law Journal* 61, 88.

[98] Ibid 89.

globalisation as potential sources of vulnerability.[99] In the United Kingdom, a report to redress systemic abuse in 'community care services' defined 'vulnerable adults' to include a person 'who is or may be in need of community care services'.[100] In Queensland, the Crime and Misconduct Commission defined a 'vulnerable victim' as those 'susceptible to becoming victims of violence' as part of the eligibility criteria for them to conduct coercive hearings under its referral powers.[101] All these examples tend to confirm Hedley J's words in *Re: Z* that 'care must be exercised in the use of the term "vulnerable"' as '[t]he term only has meaningful context in a specific context'.[102]

As for Victoria, the *Evidence Act 2008* as mentioned earlier includes a definition of vulnerable witnesses to determine entitlements to court protection from improper questioning. This definition is among the most expansive and includes those under 18, those with a 'cognitive impairment or an intellectual disability' or someone who

> the courts considers to be vulnerable having regard to any relevant condition or characteristic of the witness of which the court is, or is made aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and any mental or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject and the context in which the question is put, including the nature of the proceeding; and in a criminal proceeding — the nature of the offence to which

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[99] Lisa Rodgers , *Labour Law, Vulnerability and the Regulation of Precarious Work* (Edward Elgar Publishing, 2016) 23–4.

[100] Home Office and Department of Health, *No Secrets: Guidance on Developing and Implementing Multi-Agency Policies and Procedures to Protect Vulnerable Adults from Abuse* (20 March 2000) 8–9.

[101] Crimes and Misconduct Commission Queensland, 'Vulnerable Victims: Homicide of Older People' (2013) 12 *Research and Issues* 1, 1.

[102] *Re: Z* [2004] EWHC 2817 (Fam) [10].

> the proceeding relates; and the relationship (if any) between the witness and any other party to the proceeding.[103]

A broad, non-exhaustive definition like this that includes both inherent and situational factors of vulnerability could allow for the necessary nuance in determining vulnerability and overcome the challenges of under or over inclusiveness highlighted earlier. However, the context of this provision is very different to that of the recommendation. The *Evidence Act*'s definition is not an eligibility criterion for an additional service. Individuals within this definition are merely provided with a procedural protection that comes at no additional cost to the state. Therefore, for the purposes of the VLRC's recommendation, a definition this broad may be unfeasible.

IV Conclusion

There is a lack of consensus from both vulnerability literature and existing definitions of vulnerability in law and policy. Therefore, ultimately any prescribed guidance to determine 'vulnerable individuals' for the purposes of this recommendation would have to be originally drafted in line with the context of the recommendation. Any attempt at a definition, however, may inevitably contradict vulnerability theorists or perpetuate flawed and overly simplistic understandings of what it means to be vulnerable. Prescribing particular factors to determine vulnerability may also give rise to practical challenges. Criteria too narrow could deprive deserving individuals of the service but if the relevant factors are too broad, it could overextend the service.

[103] *Evidence Act 2008* (Vic) s 41.

CHAPTER III: ESTABLISHING VULNERABILITY

I INTRODUCTION

Still, even if the complications of defining and identifying vulnerability could be overcome, there are also several therapeutic jurisprudence implications that may arise for victims in establishing their eligibility for this service. The therapeutic jurisprudence movement was popularised by Wexler and Winick in the 90s.[104] Wexler perceived the 'law as a therapeutic agent'.[105] As such, he believed that legal processes and procedures could be 'social forces that sometimes produce therapeutic or antitherapeutic consequences. The prescriptive focus of therapeutic jurisprudence is that, within important limits set by principles of justice, the law ought to be designed to serve more effectively as a therapeutic agent'.[106]

The VLRC's recommendation appears to be trying to accommodate therapeutic jurisprudence considerations. By providing this service to alleviate some of the socio-psychological consequences of being a victim in a criminal trial, this recommendation is arguably a prime example of attempting to use a legal process or procedure as a therapeutic agent.

However, the benefits of this service must be weighed against the potential consequences for a victim as they go about establishing their eligibility for it. As mentioned above, SACPS, upon which the recommendation was to be modelled, was

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[104] Samantha Jeffries, 'How Justice "Gets Done": Politics, Managerialism, Consumerism, and Therapeutic Jurisprudence' (2005) 17 *Current Issues in Criminal Justice* 254, 258.

[105] David B Wexler, 'Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship' (1993) 11 *Behavioural Sciences and the Law* 17, 17.

[106] Ibid 21.

readily accessible to all victims of sexual assault affected by the service with no means or merits test. In contrast, the VLRC's recommendation specifies several restrictions on eligibility, one of which being that the service be used to protect 'vulnerable individuals'.[107] This suggests that should a victim intend to access the service under this limb, they would first have to establish that they are in fact vulnerable. This could raise several anti-therapeutic consequences.

II The Harmful Connotations of 'Vulnerability': What's in a Name?

First, there are the potential harms that may arise from simply requiring applicants to identify as vulnerable. On the one hand, recognising vulnerability is important, given that it is often key to ensuring 'more extensive responsibility for and responsiveness to others who are especially vulnerable'.[108] The VLRC seems to be attempting to do this by providing a valuable service that they believe vulnerable people to be most in need of. In this way, it could be said that the VLRC's recommendation actually favours vulnerability by treating only those who are vulnerable as eligible for this service.

However, it is important to consider how vulnerability and the term 'vulnerable' are perceived in society generally. The effects of language cannot be underestimated. It has been explored in several contexts from Australia's bush fires to most notably, the language of victims versus survivors in sexual assault cases.[109] In the context of the term 'victim' in sexual assault cases, it was argued that 'the term itself may evoke

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[107] Victorian Law Reform Commission, above n 3, 126.

[108] Erinn Cunniff Gilson, 'Vulnerability and Victimization: Rethinking Key Concepts in Feminist Discourses on Sexual Violence' (2016) 42 *Journal of Women in Culture and Society* 71, 72.

[109] See, eg, Tom Griffiths, 'The Language of Catastrophe: Forgetting, Blaming and Busting into Colour' (2012) *Griffith Review* 46, 47; Michael Papendick and Gerd Bohner, '"Passive Victim — Strong Survivor"? Perceived Meaning of Labels Applied to Women Who Were Raped' (2017) 12 *PlOS ONE* 1.

associations influencing our impression of the person it refers to, such as imagining him or her as someone with a weak physical constitution'.[110] Therefore, the consequences of choosing to use the word 'vulnerable' in this recommendation, a contentious word with its own various negative connotations, should be considered here.

'Vulnerability' is largely associated with traits such as 'weakness, dependency, passivity, incapacitation, incapability and powerlessness'.[111] If the recommendation's intention is to help mitigate feelings of helplessness and weakness, classifying recipients of this service as vulnerable could actually reinforce these feelings.

These traits would not be problematic if Judith Butler's universal theory of vulnerability — discussed earlier — was widely understood. After all, a more nuanced understanding of vulnerability reveals that we are all weak and powerless to varying extents and that these traits are universal, natural aspects of the human experience. Indeed, one could argue that '[t]he pursuit of invulnerability is illogical'.[112]

However, 'vulnerability' is widely considered to be a character trait specific to certain individuals and more worryingly as a trait 'to be avoided'.[113] If the 'vulnerable' are weak, powerless and in need of help, those who fall outside definitions of vulnerability have been seen to represent 'the desirable and achievable ideals of autonomy, independence and self-sufficiency'.[114]

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[110] Papendick and Bohner, above n 109, 2.

[111] Gilson, above n 108, 74.

[112] Ibid 76.

[113] Ibid 74.

[114] Martha Albertson Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *ElderLaw Journal* 71, 86.

In this way, those who fall outside the inherently artificial definitions of vulnerability in law and policy are seen as 'unencumbered, hence invulnerable, or at least *differently* vulnerable'.[115] So, in creating services for seemingly vulnerable individuals, the recipients are inadvertently branded as 'icons of pity' in need of help.[116] In the meantime, those deemed invulnerable under these definitions, while potentially deprived of beneficial assistance or services, are socially considered to be ideal, autonomous subjects who therefore do not need this help.[117] The prevalence of this harmful narrative has been explored in areas such as disability theory and the treatment of the elderly and has the potential to arise in the implementation of the VLRC's recommendation, too.[118]

Given the negative connotations of vulnerability as explored above, the VLRC should be sensitive to the potential shame victims may experience in having to prove their 'vulnerability', especially since we live in a society 'where need and vulnerability are viewed as shameful'.[119] In any decent society, the law has an obligation 'to protect the dignity of its members against shame and stigma through the law'.[120] Therefore, the inadvertent stigma and shame that may come with requiring victims to establish 'vulnerability' must not be underestimated. This is especially important when we

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[115] Fiona Kumari Campbell, 'Problematizing Vulnerability: Engaging Studies in Ableism and Disability Jurisprudence' (Speech delivered at Disability at the Margins: Vulnerability, Empowerment and the Criminal Law, University of Wollongong, 27 November 2013) 20.

[116] Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (University of Toronto Press, 1998) 130.

[117] Campbell, above n 115, 20.

[118] See, eg, Fineman, above n 114; Campbell, above n 115.

[119] Martha Craven Nussbaum, *Hiding from Humanity: Disgust, Shame and the Law* (Princeton University Press, 2004) 199.

[120] Ibid 282.

consider that articulations of shame have been found to make individuals 'weaker, more timid, less confident, less demanding, and hence only more dominated'.[121] Moreover, it is important to keep in mind that any shame a victim may experience from being considered vulnerable would be coupled with the shame, alluded to earlier, that has been found to already exist in just being termed a 'victim',[122] let alone a vulnerable one. As such, this could contradict the very purpose of the recommendation — to empower victims by providing ILRs so that they may participate and have their voices heard in their trials.

There is also the fact if victims are required to establish their vulnerability to access this service, victims could be placed in the uncomfortable position of feeling 'judged — both positively and negatively — on their personal presentation and the circumstances surrounding the crime'.[123] This was found to be a common complaint amongst interviewed sexual assault complainants accessing crimes compensation.

These victims/ survivors' also complained about how their application processes focused on 'demonstrating harm … above acknowledging the power of surviving and

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[121] Sandra Lee Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (Routledge, 1990) 97.

[122] Any further discussion on the negative connotations of the term victims is unfortunately beyond the scope of this thesis given its particular focus on 'vulnerability'. For more information on the connotations of the term 'victim' though, see, eg, Sharon Lamb, 'Constructing the Victim: Popular Images and Lasting Labels' in Sharon Lamb, *New Versions of Victims: Feminists Struggle with the Concept* (New York University press, 1999) 108, 118–9; Kaitlin M Boyle, Jody Clay-Warner, 'Shameful "Victims" and Angry "Survivors": Emotion, Mental Health, and Labeling Sexual Assault' (2018) 33 *Violence Victims* 436.

[123] Haley Catherine Clark, A Fair Way to Go: Criminal Justice for Victim/ Survivors of Sexual Assault (PhD Thesis, University of Melbourne, 2011) 121.

positive progress made by victim/ survivors'.[124] In crimes compensation, the requisite application processes are admittedly quite different, such as needing to demonstrate 'significant adverse effects experienced' by the victims.[125] For the purposes of this recommendation, victims would instead be required to demonstrate their vulnerability. However, a similar parallel consequence may arise. The criteria that this service be used to protect 'vulnerable individuals' could wrongly require victims to focus on demonstrating their vulnerability. If, as established above, society views vulnerability as antithetical to strength, the application process could inadvertently fail to acknowledge the strength of the victim/ survivor in accessing the VLRC's service and participating in their trial. This could be incredibly anti-therapeutic given that acknowledgments of survivors' strength have been identified 'as an essential part of what assisted [victims] to survive and to heal'.[126] Therefore, so long as society continues to view vulnerability as select and negative, the recommendation should be alert to the fact that the negative connotations of vulnerability may prevent victims from accessing this service.[127]

Of course there are countervailing considerations to consider. First, despite the false, societal perceptions of vulnerability, vulnerability is a universal experience that could be greatly exacerbated by being the victim of a violent indictable crime. So, some victims may take no issue with identifying as vulnerable and actually find it therapeutic to voice and express their vulnerability and have those expressions acknowledged. However, there is a risk with 'telling stories of suffering ... Stories can turn back on their storytellers. If so, these stories provide fuel for judgments, for denied moral claims

[124] Ibid 121.

[125] See, eg, *Victims of Crime Assistance Act 1996* (Vic) s 2(b), 8A.

[126] Clark, above n 123, 121.

[127] Gilson, above n 108, 80.

and reduced moral status'.[128] In this way, if a victim was denied the service after having outlined their personal experiences, this denial could be seen as a dismissal of the reality of their challenges or vulnerability and in fact produce or exacerbate — rather than reduce — their suffering.

There is also the possibility that by avoiding 'vulnerability' purely because of its negative and false connotations, the government would be implicitly confirming this flawed and narrow conception of vulnerability that is 'so dominant in society and culture'.[129] Arguably, embracing vulnerability in the context of this recommendation and creating a more expansive and nuanced definition of the term could actually be an opportunity to reform vulnerability and shift societal perceptions. However, I believe this should be weighed against the more immediate harm for applicants accessing this service while this negative perception of vulnerability continues to exist within society.

III The Problems with Proving Vulnerability

A *Jumping through Hoops*

Then there are the therapeutic jurisprudence consequences that may arise from the application process itself. Across application processes generally — from welfare benefits to insurance claims — applicants have widely complained about the psychological harm that can arise from 'jumping through hoops'.[130] In creating this

[128] Kathy Charmaz, 'Keynote Addresses from the Fourth Qualitative Health Research Conference: Stories of Suffering: Subjective Tales and Research Narratives' (1999) 9 *Qualitative Health Research* 362, 373.

[129] Gilson, above n 108, 76.

[130] See, eg, Marlyn Bennett, *'Jumping through Hoops': A Manitoba Study Examining the Experiences and Reflections of Aboriginal Mothers Involved with Child Welfare and Legal Systems Respecting Child Protection Matters* (Ka Ni Kanichihk, 2008); Bevan Warner, (Speech delivered at International Conference on Law and Courts in an Online World, Sir Zelman Cowen Centre, 9 November 2016) 8;

recommendation, there is arguably an inherent contradiction between the State offering a service to victims in response to a recognised harm they claim responsibility for, only to then place the onus of accessing that service on the victim, which for the purposes of this recommendation would be to prove that the ILR would be protecting a 'vulnerable' individual. It almost seems cruel to place vulnerable victims 'in opposition to and in competition with each other' for this limited service.[131]

Therefore, if applicants are to jump through hoops to access this service, at the very least these hoops should be clearly outlined and easy to satisfy. However, this of course becomes challenging given the subjective nature of vulnerability. Ultimately, any attempt to construct a nuanced and expansive definition will inevitably result in a definition with subjective factors of consideration and this gives rise to its own problems.

B *Distinguishing between Deserving and Undeserving Victims*

As Sara Ahmed argues, requiring applicants to establish that they are 'the right kind of subject' based on an undefined subjective test could be a harmful experience.[132] Determinations as to which applicant may be more vulnerable than another may cause decision-makers to 'weigh victims against each other and reinforce "hierarchies of suffering"'.[133] In making these decisions, decision-makers may also 'rely on

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Cynthia A HartKnott, 'Male Victims of Partner Violence' in Bonnie S Fisher and Steven P Lab (eds), *Encyclopaedia of Victimology and Crime Prevention*, 535, 537; Beyond Blue, 'Insurers under Mounting Pressure to Reform Mental Health Practices', *Beyond Blue* (online), 1 December 2017 <https://www.beyondblue.org.au/media/news/news/2017/12/01/insurers-under-mounting-pressure-to-reform-mental-health-practices>.

[131] Fineman, above n 114, 86.

[132] Sara Ahmed, *The Cultural Politics of Emotion* (Routledge, 2004) 195.

[133] Clark, above n 123, 121.

preconceptions and stereotypes about worthy or "deserving" victims'.[134] As a result, victims who are denied this service will have to contend with the anti-therapeutic consequences of having been considered undeserving or unworthy.

These challenges were actually recently noted by the VLRC themselves in a review of the Victorian crimes compensation scheme. In their report, the VLRC found that subjective factors 'resulting in refusal of awards, or the reduction of awards, including consideration of whether a victim has reported a matter to police, co-operated with police or prosecution and their broad character and behaviour "at any time"' could all 'result in subjective assessments of whether victims are innocent or deserving of assistance'.[135] In light of this, the VLRC recommended that assistance should be awarded 'according to the specified eligibility criteria, rather than through a subjective assessment of whether a victim is worthy of assistance because they are a "certain victim" as required currently'.[136] In response, the Attorney-General has said that '[t]he Government accepts all of the Commission's recommendations in principle and, if re-elected, will undertake significant work to progress these reforms'.[137]

As seen above, the victims' crimes compensation scheme uses a variety of different factors on which to assess victims such as an expansive character test. However, the overarching issue with these factors was their subjectivity. Therefore, while the VLRC's recommendation here relies on a different test of 'vulnerability', the

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[134] Ibid.

[135] Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996* (Victorian Law Reform Commission, 2018) xxvi.

[136] Ibid 225.

[137] Attorney-General, 'Review of Victims of Crime Assistance Act Tabled' (Media Release, 19 September 2018).

subjectivity of the test may similarly leave victims at risk of being excluded or judged, although albeit on different grounds. The government should therefore be prepared to avoid imposing a subjective test in the context of this recommendation that like the crimes compensation scheme could perpetuate the exclusion of certain victims on the basis of arbitrary, subjective factors.

C *Resisting the Appeal of the Deserving Victim*

Arguably, the only true solution to this would be to provide the service indiscriminately to all victims. However, it is worth noting the political challenges that may arise with implementing such a service. Often 'the politics of claims-making with regard to victimhood appear to require a "deserving" victim'.[138] As argued by Geis, 'the fundamental basis of power of the victims' movement lies in the public and political acceptance of the view that its clients [victims] are good people, done in by those who are bad'.[139] In this way, these subjective tests in victims' services allowed politicians to uphold the narrative that public funds would only serve good, innocent or deserving victims. In this case, a victim who is 'vulnerable' and therefore deserving of help.

However, the traditional paradigm of 'vulnerable and innocent victims as the very antithesis of dangerous and wicked offenders' is naïve and flawed.[140] We live in 'a far less predictable world in which much crime is committed in the context of highly

[138] Kieran McEvoy and Kirsten McConnachie, 'Victimology in Transitional Justice: Victimhood, Innocence, and Hierarchy' 9 *European Journal of Criminology* 527, 531.

[139] Gilbert Geis, 'Crime Victims: Practices and Prospects' in Arthur J Lurigio, Wesley G Skogan and Robert Carl Davis (eds), *Victims of Crime: Problems, Policies and Programs* (Sage Publications, 1990) 251, 259.

[140] James Dignan, *Understanding Victims and Restorative Justice* (Open University Press, 2005) 20.

complex social interactions between victims, offenders and possibly others'.[141] In fact, victims and offenders may often be 'drawn from the same population'.[142] After all, 'some people who start fights lose them, ending up as "victims"'.[143]

Vulnerable circumstances have also been found to increase the likelihood of a victim being also involved in criminal activity. For example, studies have shown that 'poor and non-white populations are both the most likely to be victimized and the most likely to become adjudicated offenders'.[144] Homeless individuals have also been found to often straddle the line 'between criminality and victimization'.[145]

Victims may also often fail to conform to conceptions of 'responsible citizenship'.[146] For example, research has shown that 'violence-related victimization patterns are to some extent related to lifestyles, including the frequency of visits to pubs and clubs and presumably therefore, the consumption of alcohol'.[147]

Therefore, a service for all victims would have to contend with the fact that some recipients of the service may not fit within traditional conceptions of a good, innocent or deserving victim. The VLRC and government's acknowledgment of the harm of artificial distinctions between victims in the context of Victoria's crimes compensation

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[141] Ibid.

[142] Ibid.

[143] Mike Hough, 'Victims of Violent Crime: Findings from the British Crime Survey' in Ezzat A Fattah, *From Crime Policy to Victim Policy: Reorienting the Justice System* (Macmillan, 1986) 117, 126.

[144] McEvoy and McConnachie, above n 138, 531.

[145] Ibid.

[146] Kate Seear and Suzanne Fraser, 'The Addict as Victim: Producing the "Problem" of Addiction in Australian Victims of Crime Compensation' (2014) *International Journal of Drug Policy* 826, 833.

[147] Dignan, above n 140, 20.

scheme is a promising sign that the government would be prepared to support an inclusive service in the context of this recommendation too.

However, services that distinguish between victims and cater to so-called 'deserving' victims are 'politically popular – and less expensive' and still appear to be prevalent in the framing of victims' services.[148] For example, the Commonwealth's 2017 compensation scheme for child victims of sexual abuse excludes victims 'with serious criminal convictions' unless a determination is made that an entitlement under the scheme 'would not bring the scheme into disrepute; or adversely affect public confidence in, or support for, the scheme'.[149] This exception perfectly exemplifies the temptation for victim entitlements to cater only to 'deserving' victims for fear of compromising public support.

Therefore, defending the fact that no victims should be excluded from this publicly funded recommendation and remaining impervious to the public's potential lack of support may be challenging. However, if the recommendation is truly committed to serving as a therapeutic agent, it should resist the temptation to arbitrarily distinguish between victims.

IV Conclusion

So in conclusion, even if a definition of vulnerability could be construed, the VLRC should be sensitive to the therapeutic jurisprudence ramifications of the application process. First, the process may require victims to internalise the negative connotations

[148] Kate Seear and Suzanne Fraser, 'When it Comes to Redress for Child Sexual Abuse, All Victims Should Be Equal', *The Conversation* (online), 1 November 2017 <https://theconversation.com/when-it-comes-to-redress-for-child-sexual-abuse-all-victims-should-be-equal-86456>.

[149] *National Redress Scheme for Institutional Child Sex Abuse Act 2018* (Cth) s 63(1), (5).

prevalent in society that are associated with being deemed 'vulnerable'. Having to prove their vulnerability could also detract from allowing them to assert their strength and resilience. Moreover, requiring victims to jump through hoops and defend that they deserve a service the State has volunteered to provide can be a very anti-therapeutic experience. Rejected applicants could also have to contend with feelings of unworthiness from having being denied the service. Finally, without a clear test, these rejections may also end up being based on political or moral judgments about 'deserving' victims. All these factors should be considered carefully if the VLRC's recommendation is to have its intended therapeutic effects upon implementation.

CHAPTER IV: POSSIBLE ALTERNATIVES

I INTRODUCTION

In the previous chapters, several issues were identified that would require consideration in implementing the recommendation, many of which are largely at odds with each other. For example, any constructed definition of vulnerability would have to do its best to be sensitive to the nuanced and universal nature of vulnerability. However, this would have to be weighed against the practical limitations of the recommendation and the fact that the VLRC were clearly concerned about making an open-ended recommendation to an indiscriminate group of people. There is also the fact that a subjective definition of vulnerability could leave room for judgments by decision-makers on irrelevant, anti-therapeutic factors, by pitting victims against each other or excluding victims on account of political or sociological biases about what it means to be a good or deserving victim. Finally, while identifying vulnerability may be important in ensuring those most in need of the service are served, the term carries negative connotations within society.

Ultimately, given the overly subjective and potentially harmful nature of the term, I believe the use of the words 'vulnerable individuals' in the VLRC's recommendation is both impractical and could have adverse effects on victims' wellbeing in trying to access this service. As such, I decided to examine several possible alternatives and weigh its benefits and disadvantages in light of the discussions above. These options are as follows:

- Option 1: Providing the service to select, identifiable types of victim
- Option 2: Providing the service on the basis of a means test

- Option 3: Providing the service to all victims wishing to exercise their common law right to appear and make submissions

II OPTION 1

First, there is the option of making the service available to select, identifiable types of victim as opposed to 'vulnerable individuals'. Returning to SACPS, upon which this recommendation was supposed to be based, part of SACPS's success was its accessibility. There was no application process or requirement for a determination as to who would be eligible for the service. A similar clear identification of which victims would be eligible for the service could eliminate the ambiguity of a term like 'vulnerable' and remove the need for victims to jump through hoops.

Inherent in the VLRC's recommendation was an exclusion of certain victims. First, by providing the service only to victims of violent indictable offences, which was justified on the basis of 'the more acute needs that victims of such crimes often have during the criminal trial process compared to victims of non-violent crimes'.[150] The report also listed particular subsets of victims that had been suggested as especially deserving such as 'families of homicide victims, sexual offence victims, child victims, [and] family violence victims'.[151] Therefore, the VLRC presumably already has in mind types of victims that they would approve of providing the service to.

Removing the right for a subjective discretion on the part of decision-makers, however, does mean that the service would arguably be available to a larger number of individuals and so potentially come at too great a cost to be feasible. Perhaps more

[150] Victorian Law Reform Commission, above n 3, 126.

[151] Ibid.

importantly, this approach also continues to reinforce hierarchies of suffering and the idea that some victims are more deserving than others. As such, this classification could result in the exclusion of persons who may not fall within these categories but truly need support. Also, while being denied the service may not feel as personal or individual a rejection as if victims were required to make an application on subjective tests, it would still result in blanket exclusions that could have anti-therapeutic consequences.

III OPTION 2

An alternative may, therefore, be to simply impose a means test. As mentioned above, the VLRC's recommendation funds an ILR to facilitate the exercise of an existing common law right. A victim denied this service could still retain a lawyer for himself or herself if they wished to intervene in their trials. Therefore, perhaps monetary constraint should be the only eligibility criteria. This approach has the benefits of being clearly defined and unambiguous although the same issues with exclusion arise. Also, it would appear to contradict the underlying purpose of this service.

SACPS was designed in response to the recognised particular harm of sexual assault victims having their confidential records subpoenaed. By basing the service on SACPS, it would seem that the VLRC was intending to make a similar statement by acknowledging a uniquely challenging experience for certain victims and offering a service in response. To simply use a means test would be to offer a service that is not substantially different to typical Legal Aid services, without any of the additional policy considerations of the state's recognition and response to a particularly challenging, identified victim experience.

IV Option 3

Finally, the service could simply be made available to all victims wishing to exercise their common law right to intervene in their trials. In reality, any victim choosing to appear and make submissions in their trials would most likely be doing so to protect him or herself. At the very least, in all cases, these victims would arguably be protecting themselves from the harms of the role of the victim in criminal trials that this service intends to ameliorate. As for being vulnerable, as Judith Butler argues, we are all vulnerable and victims of a violent indictable offence would probably be particularly so. Therefore, allowing the service to be accessible by all victims is arguably not that far an extension from what the VLRC originally envisaged. Most importantly, this approach removes any issues with exclusion or anti-therapeutic application processes.

Of course, this approach would also require the greatest financial commitment and allocation of resources. However, I believe further research should be done as to how great a financial commitment such a service would be before dismissing its viability. After all, there are several threshold requirements before a party is allowed to intervene in a trial. While a victim may be entitled to unreservedly call the service and receive advice, as with SACPS, a victim may simply be seeking advice as to whether or not they have a case. In cases where victims do not have one, a single conversation with a lawyer whose sole obligations are to the victim could be the full extent of a victim's engagement with the service. There is also the fact that judges ultimately have the discretion to allow an intervention in these trials. The likelihood that an ILR would have to represent a client for the duration of an entire trial should therefore be considered in evaluating the actual financial burden of this service.

Further research should also be done into how often victims actually appear and make submissions. It should also be noted that however prevalent the phenomena may be now, that number would likely decrease as the VLRC's other recommendations from the report are implemented such as better consultation practices with the prosecution and a generally greater respect for the 'victims' role as a participant' in their trials is fostered.[152] It is likely that an intervention will probably be the last resort for most victims if the prosecution's duties of consulting with victims and ensuring that they are well informed are properly met. Therefore, while any in-depth research on this point is beyond the scope of this thesis, the financial burden of this service may not be as great as the VLRC imagines. However, ultimately whatever the cost of the service, it should be kept in mind that this is the only approach that would avoid the harmful and immoral segregation of victims.[153]

[152] See, eg, *Victims and Other Legislation Amendment Bill 2018* (Vic) ss 9A–9C.

[153] Seear and Fraser, above n 148.

CONCLUSION

The VLRC's report on the role of victims in criminal trials acknowledged an often under-considered reality. While most people associate the criminal justice system with seeking redress for victims, victims are often an ancillary component to the trial process. In light of this, the VLRC recommended ILRs be provided in certain circumstances to help empower victims in certain circumstances. This could be an important step in facilitating victim participation and alleviating common complaints from victims about the trial process.

One of the prescribed circumstances for ILRs was to protect 'vulnerable individuals' but without any guidance as to how these vulnerable individuals would be defined. Due to the potential importance of this recommendation, it was important that the feasibility of this recommendation be examined. However, in doing so several challenges emerged.

First, vulnerability is a highly disputed and subjective concept that cannot be adequately defined without creating a definition too expansive to be properly implemented. Existing definitions of vulnerability also proved unhelpful due to their overt specificity and narrowness. Aside from the challenges of defining vulnerability, there were also therapeutic jurisprudence consequences to consider from the need for victims be deemed 'vulnerable' in order to access the service — a term that unfortunately often carries negative connotations. Also, the subjectivity of vulnerability not only complicates the application process for victims but also implicitly creates two classes of victims — those deserving of support and those who are not, which can have harmful, anti-therapeutic consequences. For these reasons, 'vulnerability' is an inappropriate

qualification for the purposes of this recommendation. In conclusion, if the government truly believes, as I do, that this could be a valuable service that victims deserve, it should be made available to all victims.

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